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IN THE

Supreme Court of the United States

October Term, 1966

No. 565

BARBARA L. HIATT,

Petitioner,

vs.

SAN FRANCISCO NATIONAL BANK, AND FEDERAL DEPOSIT INSURANCE CORPORATION as Receiver of SAN FRANCISCO NATIONAL BANK,

Respondents.

PETITION FOR REHEARING OF DENIAL OF PETITION FOR WRIT OF CERTIORARI OR REMAND, TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

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WESTERN PRINTING COMPANY, WHITTIER—OXBOW 8-1722

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Petitioner prays that this Court grant a rehearing of its Order of November 14, 1966, denying the Petition for Writ of Certiorari, and that in the alternative, either a Writ of Certiorari issue to review the judgment of the Court of Appeals for the Ninth Circuit in the above-entitled case as prayed for in the Petition filed Semptember 17, 1966, or, the case be remanded for further consideration by the Court of Appeals.

REASONS FOR GRANTING REHEARING OR REMANDING THE CASE TO THE COURT BELOW.

1. There is an unresolved ambiguity of fundamental importance in R.S. §5197, 12 U.S.C. §85, which the Court below failed to perceive, but by its decision, resolved, plainly contrary to the legislative history. 12 U.S.C. §85 reads, *inter alia*, "Any [national banking] association may . . . charge . . . interest at the rate allowed by the laws of the State. . . ." The Court below interpreted the term "allowed" to mean "permitted without limit," in the case at bar. This interpretation of the term "allowed" was made by the Court below without reference or citation to legislative history, and it is diametrically opposed to the meaning Congress intended, for the reasons which follow.

All states historically had, and currently have, two rates of interest: the "established (or legal) rate of interest," and the "allowed (or contract) rate of interest." See 3 CCH Federal Banking Law Reporter, §59,005, pages 37,071-37,079 (1966). The "legal or established rate of interest" is the maximum rate of interest that may be charged in the absence of an agreement to the contrary by the parties. The "allowed or contract rate of interest" is the maximum rate of interest that the parties may agree to under the laws of a state. This is indisputably established by the laws of each state and by the following legislative history.

The National Currency Act of 1863, Section 46, forbade national banks to charge a rate of interest exceeding the *established rate of interest* (of each state), and if a national bank did so, the penalty was *forfeiture of the entire debt.*

The National Bank Act of 1864 repealed the 1863 Act, and very extensive congressional debate preceded the enactment of the 1864 Act. None of the debates and proceedings in either house of the Congress, nor any other legislative history, has ever been cited or quoted by this Court, the Court below, or any other federal court in determining the meaning of the term "allowed" as used in Section 30 (R.S. §5197) of the National Banking Act of 1864. This statement is categorically true with respect to the two leading decisions on R.S. §5197, *Tiffany v. Bank of Missouri,* 18 Wall. 409, and *Daggs v. Phoenix National Bank,* 177 U.S. 549.

This Court has held that it is proper to go back to the law as originally enacted to ascertain the Congressional intent. *Nye v. United States,* 313 U.S. 33; *Williams v. United States,* 327 U.S. 711. More importantly, this Court has held that a long continued construction of a statute will not be followed when further research demonstrates that construction to be erroneous. *Erie Railroad Co. v. Tompkins,* 304 U.S. 64. This is precisely the situation presented by the case at bar.

The following excerpts from debate on the floor of the Senate clearly reveal the Congressional intent in enactment of Section 30 (relating to interest rate limits and usury) of the National Banking Act. All quotations are from *The Congressional Globe,* May 5, 1864, pages 2125 and 2127:

> MR. GRIMES. * * * I apprehend that there is not a Senator who does not see that there is a very wide difference between the law of last winter, which authorized them to take the rate of interest "established" by the laws of the State, and this act which it is proposed to pass into law, allowing them to take the rate which may be "allowed" by the laws of the State, which runs up as high as ten per cent.
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> MR. SHERMAN. I look upon it that the word "established" and the word "allowed" have substantially the same legal signification. Senators may do as they please upon it, but I look on the two words as precisely the same.
>
> MR. FESSENDEN. I do not consider them the same, so far as Iowa is concerned, at any rate. I think as a general rule "established" and "allowed" are the same thing, but it seems that in the State of Iowa "established" and "allowed" do not mean the same thing.
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> MR. TRUMBULL. Nor do they in my State.
> MR. FESSENDEN. Nor do they in the State of Illinois. That I did not understand when the words were put in. I do not know hovever that I object to it if other States are let alone.
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> * * *
>
> MR. DOOLITTLE. There is in my judgment a very great diference between the word "allowed" and the

word "established," and I will illustrate the case by what I believe to be the present law of the State of Wisconsin * * *.

* * *

MR. FESSENDEN. I ask permission to make a suggestion. I wish to suggest that if this amendment could be made a little more definite there might perhaps be no objection to it. There may be and there are States where no particular rate of interest is fixed for banks, and this provision ought to provide for that case.

MR. HENDERSON. The Senator certainly did not understand what I said a few moments ago. I propose if this amendment be adopted to follow it by inserting the word "such" after "no," in the seventh line, so as to read, "when no such rate is fixed by the laws of the State or Territory the bank may take, receive, reserve or charge a rate not exceeding seven per cent.," and instead of "a rate not exceeding seven per cent." I would say "a rate not exceeding that allowed to be charged on a special contract to individuals."

The National Banking Act of 1864 was approved on June 3, 1864, less than one month after the above-quoted proceedings occurred on the floor of the Senate, and the interest rate limitations and usury provisions of that Act reflect the debate set forth above. The debates clearly establish that the Congress intended that national banks be limited in the interest rates they could charge, by not exceeding the "allowed" rate of interest (of each State). And, the term "allowed" as used in the phrase "rate of interest allowed by the laws of the State" was indisputably intended by the Congress to mean the *contract rate of interest fixed by State law.*

The "allowed (or contract) rate of interest" in California is ten per cent, pursuant to Article XX, Section 22, California Constitution. Yet, the Court below held the "allowed rate of interest" in California to be unlimited. Appendix, page a-7, petition for writ of certiorari; 361 F. 2d 504 at 507. Thus, the very foundation of the rationale of the opinion of the Court below crumbles in light of this analysis, and it is urged that the case be remanded so that the Court below may reconsider its decision in light of this controlling and heretofore ignored legislative history.

Additional proceedings upon the floor of the House and Senate are set forth in the Appendix, pages 1-a and 1-b. These debate excerpts, while merely a small portion of the extensive discussion of interest rate limitations, are exemplary of the sense of both Houses of the Congress.

2. In 1933, Congress significantly amended 12 U.S.C. §85 to indicate its plain intent that national banks could not charge interest rates greater than the interest rate limitations on loans therein set forth, and the congressional amendment added the words . . . "*whichever may be the greater,*[*and no more*]" . . . . (Emphasis supplied.) The Congress also inserted an alternative interest rate limitation based upon the discount rate of commercial paper, which is regulated by the Federal Reserve Bank. Conference Report, No. 254, H.R. 5661, Banking Act of 1933, Section 25, page 30 (June 12, 1933). Yet, the Court below completely

ignored the fact and significance of these 1933 amendments by the Congress, and instead, grounded its opinion solely upon two decisions of this Court handed down in 1874 and 1900. *Tiffany v. Bank of Missouri,* 18 Wall. 409; *Daggs v. Phoenix National Bank,* 177 U.S. 549.

Tiffany construed Section 46 of the National Currency Act of 1863, and *Daggs* construed Section 30 of the National Banking Act of 1964. The failure of the Court below to accord significance to the amendments made by the Congress in 1933 invites application by this Court of its supervisory powers under its Rule 19, or, a remand to the Court below for reconsideration of the case in light of the Congressional amendments made thirty-three years after the latest decision cited by the Court below as authority.

3. The issues at stake in this case are currently, and will continue to be, of cardinal importance to numerous national banks and their borrowers. The federal law controlling interest rates and liability for usury is in a state of confusion. State courts have concurrent jurisdiction with the federal courts to entertain usury suits under 12 U.S.C. §§85, 86, and the various States have decided the cases both ways, not because of unique facts, but due to confusion over the meaning of 12 U.S.C. §85. The only current treatise available to petitioner on banking law does not even attempt to reconcile the conflicting decisions. See, 7 *Michie on Banks and Banking,* §191 (1944 ed., with 1964 supplement.)

More than twenty-six States have provisions in their usury laws which remove all interest rate limitations on the rates of interest changeable by national banks to corporate borrowers. A decision of this Court is of critical importance to the construction of 12 U.S.C. §85, not only in the case at bar, but for purposes of a virtually identical situation in more than twenty-six other States.

CONCLUSION

For the reasons set forth above, it is respectfully urged that a rehearing be granted and that, upon such rehearing, the case either be remanded to the Court of Appeals for the Ninth Circuit for reconsideration of its decision, or a Writ of Certiorari issue to that Court.

Respectfully submitted,

COLEMAN J. LESSER
Counsel for Petitioner.

CERTIFICATE OF COUNSEL

I hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the Rules of this Court.

Respectfully submitted,

COLEMAN J. LESSER
Counsel for Petitioner.